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Trade Regulation: An Expanded Interpretation of Section 5(b) of the Clayton Act

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freely to choose his business form in order to achieve favorable tax results, other considerations are involved in a professional's use of the corporate form. Additional tax liabilities,[43] the possibility of practical operating problems,[44] and some ethical considerations[45] remain present. However, in spite of these issues, and the fact that the entire question of professional incorporation is not finally settled, the instant case is important as a step toward forcing an examination of the relevance of tax criteria as applied to professional associations and corporations.

Trade Regulation: An Expanded Interpretation of Section 5(b) of the Clayton Act

In 1961 the government instituted antitrust proceedings against four major rock salt producers and distributors seeking to punish and restrain a conspiracy to fix the price of deicing rock salt.[1] Hardy Salt Company was named as a coconspirator but not as a defendant in this action. Within one year after the Supreme Court affirmed the judgment obtained in the government's civil action, private treble damage actions in which Hardy was named as a defendant were initiated by several state and local government agencies under section 4 of the Clayton Act.[2] Hardy moved to dismiss on the ground that section 5(b) of the Clayton Act[3] had not tolled the statute of limitations and

43. *See generally* J. MERTENS, *supra* note 5, §§ 38.02-.14 (1967); Anderson, *supra* note 2, at 314-16.

44. Deering, *supra* note 20, at 112-13. *See also* Eaton, *supra* note 2, at 682-85.

45. ABA COMM. ON PROFESSIONAL ETHICS, OPINION No. 303 (1967).

1. Criminal indictments were returned on June 28, and civil antitrust actions were commenced on July 11, 1961, against Morton Salt, Diamond Crystal Salt, International Salt, and Carey Salt Companies. A judgment returned in the civil action against Morton and Diamond Crystal on November 24, 1964, was affirmed *per curiam* by the Supreme Court in Morton Salt Co. v. United States, 382 U.S. 44 (1965).

2. 15 U.S.C. § 15 (1964).

3. Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . , the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: . . . any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

38 Stat. 731, *as amended*, 15 U.S.C. § 16(b) (1964).

hence the action was barred.[4] Upon interlocutory appeal from the district court's denial of this motion, the Eighth Circuit Court of Appeals *held* that where one who was named only as a co-conspirator in a government antitrust action is subsequently a defendant in a private suit, section 5(b) tolls the statute of limitations during the pendency of and for one year following the termination of the government litigation. *Hardy Salt Company v. Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967).

Originally, section 5 of the Clayton Act provided for suspension of the statute of limitations during the pendency of any action arising out of any matter complained of in the government suit.[5] These tolling provisions were initially construed by the courts to be a necessary adjunct of the *prima facie* evidence provisions of that section, which allowed a private litigant to use a government obtained judgment or decree as *prima facie* evidence in a subsequent action.[6] As a consequence, the principles of collateral estoppel applicable to the evidentiary provisions were also held to restrict the application of the tolling provisions to parties who had been designated as defendants in previous government antitrust litigation.[7]

In 1955 Congress amended the Clayton Act. The tolling provisions were extended to include a one-year period following

4. Unless the statute of limitation was tolled by § 5(b) the private action would have been barred by § 4(b) of the Clayton Act which provides: "Any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued. . . ." 15 U.S.C. § 15(b) (1964).

5. 38 Stat. 731 (1914).

6. The general implications discernible in the legislative history of § 5 of the Clayton Act neither directly support nor refute this construction. Section 5 was originally designed to encourage persons of small means to bring antitrust actions. 51 CONG. REC. 1979 (1914) (remarks of President Wilson); H.R. REP. No. 627, 63d Cong., 2d Sess. 14 (1914).

7. *See* Sun Theatre Corp. v. RKO Radio Pictures, 213 F.2d 284 (7th Cir. 1954); Momand v. Universal Film Exchs., 172 F.2d 37 (1st Cir. 1948); Levy v. Paramount Pictures, 104 F. Supp. 787 (N.D. Cal. 1952); Christensen v. Paramount Pictures, 95 F. Supp. 446 (D. Utah 1950).

The coextensive construction of the evidentiary and the tolling provisions reached its apex in Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190, 196 (9th Cir. 1956), where the court held "[t]he same means must be used to achieve the same objectives of the same conspiracies *by the same defendants* . . . ." (Emphasis added.) A contrary construction of the provisions of § 5(b) first appeared in Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1962), where the court indicated that only a "substantial identity" between the government and the private action was necessary in order for the statute of limitations to be tolled by § 5(b). *Id.* at 570.

termination of the government litigation[8] and a uniform four-year statute of limitations was established.[9] The Supreme Court in construing the amended section 5 expressly rejected, in *Minnesota Mining v. New Jersey Wood Company*,[10] the previous construction that the tolling provisions were merely accessory to the *prima facie* evidence provisions.

Minnesota Mining had argued that since the Federal Trade Commission order could not be used as *prima facie* evidence in a private action, section 5(b) did not toll the statute of limitations during the government litigation.[11] Although the Court recognized that the tolling provisions complemented the evidentiary provisions, it stressed that Congress had intended the tolling provisions "to serve a more comprehensive function" by aiding private litigants in other ways as well.[12] The availability of documents at the close of government litigation, the resolution of complex questions of law, and reliance upon government resources and expertise were enumerated by the Court as beneficial byproducts of freeing the tolling provisions from the restrictions of collateral estoppel.[13] It was also pointed out that the phrase "final judgment or decree" appears in and is of vital significance to the application of the evidentiary provisions,[14] while the tolling provisions are effective regardless of the final outcome of the government litigation.[15]

The Supreme Court again construed section 5(b) in *Leh v. General Petroleum Corporation*,[16] where the government anti-

8. 15 U.S.C. § 16(b) (1964). This additional period of suspension was included to insure that the private plaintiff would have an adequate time upon conclusion of the government litigation to "study the Government's case, estimate his own damages, assess the strength and validity of his suit and prepare and file his complaint." H.R. REP. No. 422, 84th Cong., 1st Sess. 8 (1955). However, its inclusion was also premised upon the conviction that it would shorten the overall period of antitrust litigation. *Id.*

9. 15 U.S.C. § 16(b) (1966). A uniform four-year statute of limitations was established in order to eliminate obvious unfairness which often resulted from the application of varying state statutes of limitations. *See* S. REP. No. 619, 84th Cong., 1st Sess. 4-5 (1955); *Antitrust Enforcement By Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1030-31 (1952); Note, *Treble Damages Time Limitations: Federalism Rampant*, 60 YALE L.J. 553 (1951).

10. 381 U.S. 311 (1965).

11. *Id.* at 318.

12. *Id.* at 319.

13. *Id.*

14. *Id.* at 316.

15. *Id. See also* Radio Corp. of America v. Rauland Corp., 186 F. Supp. 704, 709-10 (N.D. Ill. 1956).

16. 382 U.S. 54 (1965).

trust action and the subsequent private suit involved concentric geographic areas, different but somewhat overlapping time spans, and variations in named parties.[17] The Court held that it was not necessary that the two actions have "the same breadth and scope in time *and participants*" in order to have the "substantial identity" necessary to come within the "any matter complained of" language of section 5(b).[18] The Court's adoption of the substantial identity test—liberally construing the statutory requirement that the suits be based on the same subject matter—lent additional impetus to the *Minnesota Mining* construction of 5(b) as an independent and vital provision of the antitrust laws.[19]

Finally, in *Michigan v. Morton Salt Company*,[20] the district court case out of which the instant case arose, the applicability of section 5(b) to previously unnamed defendants was squarely in issue.[21] In a comprehensive opinion based primarily upon *Leh*, the district court concluded that 5(b) had tolled the statute of limitations as to all defendants in the private action, even though some were neither parties to, nor named coconspirators in,

17. The private action out of which *Leh* arose did not include two of the parties who had been defendants in the earlier government action. The private complaint had also named a defendant who had not been involved in the government action, but that defendant was dismissed from the action prior to the appeal to the Supreme Court. *Id.* at 59-62.

18. *Id.* at 63 (emphasis added). Several explanations were also offered by the Court for variations in named defendants which might occur between the government and the private action which are unrelated to the government's claim.

> In the interium between the filing of the two actions it may have become apparent that a party named as a defendant by the Government was in fact not a party to the antitrust violation alleged. Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. *On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net.*

Id. at 63-64 (emphasis added).

19. For other analyses of *Minnesota Mining* and *Leh* see McSweeny, *The Statute of Limitations in Treble Damage Actions Under the Federal Antitrust Law—When the Period Begins and Tolling By Government Actions and Fraudulent Concealment*, 11 ANTITRUST BULL. 717 (1966); Note, *Clayton Act Tolling Provision—A New Interpretation*, 23 WASH. & LEE L. REV. 353 (1966).

20. 259 F. Supp. 35 (D. Minn. 1966).

21. This issue had not been presented in either *Minnesota Mining* or *Leh*. By the time those cases had been presented for appeal only previously named parties were still involved. See note 17 *supra*. In the instant case at least one defendant in the private action, Cargo-Carriers, had not been designated as either a defendant or as a coconspirator in the government action. 259 F. Supp. at 53 n.16.

the previous government litigation.[22] The court concluded that a liberal application of section 5(b) would promote the congressional policy of aiding private antitrust litigants.[23]

In the instant case the court of appeals has again interpreted section 5(b) so as to extend possible benefits of previous government litigation to plaintiffs who institute private antitrust actions. The court reasoned that including previously named coconspirators within the ambit of the tolling provisions would result in effective localization of the plaintiff's suit and enable him to link his damages to those conspirators who most directly caused his injury.[24]

Although the court recognized that a long line of earlier decisions had restricted the application of section 5(b) to previously named defendants, it believed that the legislative history of the statute neither dictated nor implicitly approved that limited construction. As the court aptly pointed out, the private plaintiff orientation of the 1955 amendment coupled with Congress' failure to concern itself with 5(b)'s applicability to previously unnamed parties could not reasonably be construed as re-

22. 259 F. Supp. at 55. *See* New Jersey v. Morton Salt Co., 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,300 (3d Cir. Dec. 8, 1967); Vermont v. Cayuga Rock Salt Co., 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,255 (D. Me. Oct. 17, 1967) (reaching similar results). *See also* 67 COLUM. L. REV. 572 (1967), where the conclusion was reached that the prejudice to previously unnamed defendants requires that the application of the tolling provisions be restricted to previously named parties. *But see* 55 GEO. L.J. 930 (1967), where the writer concluded that the district court's interpretation could be justified in light of public policy considerations.

23. 259 F. Supp. at 35. Application of the tolling provisions to other than previously named defendants necessarily raises the problem of adequate notice of possible outstanding claims. The district court, in *Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 1966), indicated that a defendant's familiarity with his affairs should enable him to ascertain whether a potential antitrust claim could eventually be asserted against him. This concept of constructive notice through self-familiarity has found recent implicit approval in *New Jersey v. Morton Salt Co.*, 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,300 (3d Cir. Dec. 8, 1967), where the court countered the lack of notice argument by stress ing:

> . . . the "substantial identity" requirement [of Section 5(b)] . . . gives *some assurance* that the defendant . . . may reasonably be expected to have an *awareness* of the Government proceedings. Otherwise the private plaintiff *probably* will not be able to comply with the requirement . . . .

Id. at 84,751 (emphasis added).

In the instant case, Hardy's designation as coconspirator purportedly afforded adequate notice of Hardy's susceptibility to subsequent private antitrust actions.

24. 377 F.2d at 774-75.

quiring a "niggardly application of the tolling provisions."[25] The court indicated that the clear and unambiguous language of section 5(b) also evidenced a congressional intent to give the tolling provisions a broader interpretation than the evidentiary provisions of section 5(a);[26] section 5(b) refers to "private right of action" and "any matter complained of" while the provisions of 5(a) are applicable only to named defendants.[27]

Minnesota Mining was relied upon by the court as discrediting the view that section 5(b)'s benefits were to be commensurate with those available under section 5(a).[28] *Leh* was said to reaffirm *Minnesota Mining's* rejection of the previous limited construction of section 5(b) and to indicate a reluctance on the part of the Supreme Court to deprive private plaintiffs of possible benefits solely on the basis of the government's arbitrary choice of defendants.[29] Explanatory dicta from *Leh* in which the Supreme Court had seemingly placed previously named defendants and named coconspirators in the same category was also reiterated for support.[30]

Despite the holding that inclusion of a previously named coconspirator in a private action would not destroy the substantial identity necessary for invocation of the tolling provisions, the court's opinion indicates that all previously *unnamed* parties cannot expect to remain beyond the reach of the tolling provisions.[31] While there can be little dispute with the court's interpretation of legislative history, the language of the statute, or the import of *Minnesota Mining* and *Leh*, the court's evaluation of underlying policy considerations is open to question. The court is apparently prepared to conclude that the policy of

25. *Id.* at 772; *see* S. REP. No. 619, 84th Cong., 1st Sess. 4-5 (1955); H.R. REP. No. 422, 84th Cong., 1st Sess. 6-7 (1955).

26. 377 F.2d at 774.

27. *Id.*; see note 3 *supra*.

28. 377 F.2d at 772.

29. *Id.* at 774.

30. *Id.*; see note 18 *supra* (emphasized portion). Additional support for the court's holding can be found in those decisions which indicated that whether the same matters were complained of in the private and the government actions could be determined by juxtaposing the government's complaint, statement of facts, and decree against the complaint in the private action. *See* United Banana Co. v. United Fruit Co., 172 F. Supp. 580, 586 (D. Conn. 1959); Radio Corp. of America v. Rauland Corp., 186 F. Supp. 704, 708 (N.D. Ill. 1956). This rather mechanical test was reiterated in *Leh* and such an obvious comparison could be made in the instant case since Hardy's name did appear in the government complaint.

31. 377 F.2d at 775.

achieving effective antitrust law enforcement through private action outweighs the clearly enunciated competing policy of having an effective statute of limitations applicable to antitrust actions.

At first glance, allowing the private plaintiff to make his suit all-inclusive would appear to be of obvious merit. However, it is clear that granting such discretionary latitude to the private plaintiff is not an essential prerequisite to full and complete recovery. The plaintiff's federally created cause of action sounds in tort and possesses the attribute of joint and several liability.[32] Full monetary recovery could be obtained from any of the previously named defendants. As has been pointed out, "[t]he greatest *single* hurdle to be surmounted in any private antitrust suit is the securing of adequate competent evidence . . . that a violation has taken place and that the plaintiff has suffered compensable damages . . . ."[33] The *prima facie* evidence provisions of section 5(a) can be used to ease this burden in an action against previously named defendants. Furthermore, the fact that the statute of limitations may have run as to some potential defendants would not prevent the plaintiff from using the subpoena powers and other discovery techniques to obtain information from these unnamed parties. This still allows him to "localize" his suit as to available defendants and prove the impact of the conspiracy upon his trade or business.[34]

Balanced against any possible benefits inuring to the private plaintiff as a result of the tolling provisions are the general policy considerations which require having a statute of limitations applicable to antitrust cases in the first instance. Generally such statutes are defendant oriented. They are designed to prevent the assertion of stale claims and to insure that a defendant has adequate notice of an impending suit within the statutory period.[35] They also are a means of providing the stability and certainty necessary for long-range participation in business activities. In addition, Congress affirmatively expressed its conviction that a uniform, four-year statute would

32. Sun Theatres v. RKO Radio Pictures, 213 F.2d 284, 293 (7th Cir. 1954).

33. Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 170 (1958) (emphasis added). For a general discussion of difficulties which confront a private antitrust plaintiff see Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5 (1959); Guilfoil, *Private Enforcement of U.S. Antitrust Law*, 10 ANTITRUST BULL. 747 (1965); Loevinger, *supra*.

34. *See* FED. R. CIV. P. 26(a) & 45.

35. *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965).

best serve the interests of potential antitrust litigants by adding such a provision to section 5(b) in 1955.[36]

The 1955 amendments to the tolling provisions can reasonably be viewed as a practical compromise between the propensity to aid private antitrust litigants and the need for a short, uniform statute of limitations. While it may be argued that Congress contemplated the inclusion of named defendants only, the court's extention of the tolling provisions to previously named coconspirators does not grossly infringe upon the policies which underlie those amendments. However, if complete disparity of parties is no longer to be a major consideration in determining whether the private and the government actions have the degree of "substantial identity" necessary for invocation of the tolling provisions, and if a liberal construction is afforded to whatever remains of the "substantial identity" test, Congress' efforts to provide a uniform statute of limitations may be viewed as an exercise in futility with respect to those large segments of the business community which are or have been involved in some form of government antitrust proceeding. Under the current construction of section 5(b), tolling—with the period of suspension determined solely by the often protracted period of government antitrust activity—will become the rule rather than the exception. The resulting burdens to potential defendants may be onerous indeed when contrasted with the rather minimal benefits afforded by the application of the tolling provisions to previously unnamed parties.

36. *See* note 4 *supra* and accompanying text.